Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77- ———

CHARLES BEN HOWELL, Suing on behalf of himself and all other persons similarly situated, as a class ..... *Petitioners*

v.

DALLAS BAR ASSOCIATION, Et al ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Charles Ben Howell, suing on behalf of himself and all other persons similarly situated, as a class, complains of the respondents, Dallas Bar Association, a corporation, Snowden M. Leftwich, Dee Brown Walker, Jerry L. Buchmeyer, and all persons serving as members of the Dallas County Grievance Committee, Sixth Bar District of Texas (Formerly known as Fifth District) since February 22, 1972. Petitioners request the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgments and orders entered in that court in its cause number 75-3326 where petitioners were appellants and the respondents were appellees.[1]

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[1]Unless otherwise indicated, all emphasis has been supplied by petitioners.

OPINION BELOW

The opinion of the United States District Court, Northern District of Texas, Dallas Division (P.A.19),[2] dated April 2, 1975, is unpublished. The order of the United States Court of Appeals for the Fifth Circuit, affirming without opinion (P.A.23), dated April 21, 1977, is published in tabular form only, 551 F. 2d 861. The denial of the petition for hearing en banc (P.A.24), dated June 14, 1977, is tabulated at 554 F. 2d 1065.

Opinions in related cases: *Ex parte Charles Ben Howell*, 488 S.W. 2d 123 (Tx. Cr. 1972) dism.wt.subs.fed.ques. 414 U.S. 803 (1973); *Howell v. Jones*, 516 F. 2d 53 (5-Tx. 1975), cert. den. 424 U.S. 916 (1976).

JURISDICTION

The judgment of the Court of Appeals was dated and entered April 21, 1977 (P.A.23). The Court of Appeals extended the time to petition for rehearing until May 31, 1977. A petition for rehearing was filed on May 31, 1977 and was denied on June 14, 1977 (P.A.24). This petition is being filed within 90 days thereafter. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

QUESTION ONE:

Considering the facts of this case and the number and complexity of the issues presented, did not the Fifth

[2]In referring to the record of proceedings in the court below, petitioners will employ the following abbreviations: (P.A.___) — Petitioner's Appendix attached to the rear of this petition, (J.A.___) — Joint Appendix filed with the Clerk of the Fifth Circuit, (R.___) — Record of Proceedings prepared by U. S. District Clerk, Northern District, Texas.

Circuit deny important rights by affirming without giving any indication of the basis for its decision?

QUESTION TWO:

Did the District Court err in holding that by a mere reading from the face of the complaint, it had been established to a certainty that the defendant state court judges never departed from "the sheltered zone of judicial jurisdiction?" On the other hand, are plaintiffs correct in their proposition that "judicial immunity to damages is not absolute unless the act is absolutely judicial?"

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The United States Constitution, Amendment Five: No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

The United States Constitution, Amendment Fourteen, Section 1: * * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 *U.S.C.*, §1291: The courts of appeals shall have jurisdiction of appeals from all final decisions of the District courts of the United States, * * *, except where a direct review may be had in the Supreme Court.

42 *U.S.C.*, §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 *U.S.C.*, §1985: (2) If two or more persons in any State * * * conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws * * *;

(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, * * *; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, * * * the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Court of Appeals, Fifth Circuit, Local Rule 21: When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an

opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or ENFORCED. See Local Rule 21."

See N. L. R. B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F. 2d 966.

STATEMENT OF THE CASE

This is a class action brought in the United States District Court for the Northern District of Texas by Charles Ben Howell, an attorney, on behalf of himself and all others similarly situated (P.A.1). The jurisdiction of the court of first instance was invoked under 42 *U.S.C.* §§1983-1986. Mr. Howell has been described as a "perennial" candidate having run several times for one of the state court judgeships situated in the Courthouse at Dallas County, Texas (P.A.3). The defendants are the local bar association, members of the local grievance committee, and two state court judges (P.A.1-4). It is alleged that the bar association and the grievance committee are controlled and dominated by big-firm establishment type lawyers who engage in various illicit practices in an effort to secure the election and appointment of judges favorable to themselves and their clients (P.A.4-7). Various unlawful acts are alleged, including the use of a not-for-profit corporate facade to solicit and expend tax deducted campaign contributions, slanted political polling practices, rules and disciplinary practices calculated to inhibit lawyers from publicly expressing a preference for judicial candidates, and the use of disciplinary proceedings, both actual and threatened, highly publicized and specifically timed, to

influence the outcome of jury elections (P.A.7-11, 16-18). Because of these tactics, members of plaintiff class have been inhibited from offering themselves for judicial office in Dallas County, Texas. Those members of the class who have offered themselves for political office without the sanction and against the wishes of the Dallas Bar Association (DBA) hierarchy have suffered personal repression and have had their candidacy destroyed by the illicit tactics alleged in the complaint. Repressive grievance proceedings are carried out through the Dallas County Grievance Committee (DCGC), nominally an official state agency, but in fact, dominated and controlled by and through DBA (P.A.7-11, 16-18).

In addition to the foregoing practices which petitioner Howell pleads as having been practiced against himself in common with others, he complains of a politically motivated disbarment suit commenced against him seven days before the date of the 1974 general election (P.A.7). In 1970, the DBA-DCGC combine had previously filed another politically motivated disbarment suit against one Chester Oehler, timed and calculated to defeat his candidacy (P.A.16). The disbarment suit against petitioner Howell was based upon a dispute between Howell and Judge Walker growing out of a divorce hearing occurring in May of 1971. As a result of this dispute, Judge Walker both brought contempt proceedings against petitioner Howell and complained to DCGC concerning Howell's conduct (P.A.14). The contempt proceedings are described in *Ex parte Howell*, 488 S.W. 2d 123 (Tx. Cr. 1972) dism.wt.subs.fed.ques. 414 U.S. 803 (1973) and *Howell v. Jones*, 516 F. 2d 53 (5-Tx. 1975), cert.den. 424 U.S. (1976). In both instances this Court declined to intervene.

For almost two years, defendant Walker attempted to use the power of his office to influence DCGC to commence disbarment proceedings against plaintiff Howell but DCGC declined to do so because it could find nothing unlawful in plaintiff's conduct. They finally held an administrative hearing where Judge Walker misrepresented his communications to Judge Holland who had presided over the contempt charges instituted by Judge Walker. Plaintiff Howell demonstrated at such hearing that Judge Walker's complaint was a mere spite action but DCGC refused to dismiss the proceedings because on the one hand they were reluctant to incur the displeasure of Judge Walker and on the other hand they were possessed of substantial dislike for plaintiff because of his political campaigns against DBA-DCGC sponsored candidates and his public statements questioning the fairness of the judicial polling practices of DBA (P.A.13).

After the lapse of almost two years after Judge Walker presented his complaint to DCGC and it had taken no action, petitioner again became a candidate for judicial office running against defendant Judge Leftwich, pleaded as being another judge sponsored and favored by the DBA-DCGC combine. Despite efforts of DBA to slant the poll, Judge Leftwich made an extremely poor showing upon the DBA sponsored poll and petitioner Howell seized upon this poll as a major campaign issue. Defendant Leftwich appealed to DBA for assistance in saving his seat and DBA decided that the only way to salvage the situation was to institute proceedings against plaintiff Howell through DCGA (P.A.9-10).

A disbarment suit was filed against plaintiff Howell seven days before the election in the name of DCGC. Plaintiff pleads that the suit was purposely timed and

calculated, and the allegations therein made were particularly tailored, to generate adverse publicity against plaintiff Howell and to defeat his candidacy for office. Judge Walker's complaints are pleaded as being no more than a handy vehicle through which the DBA-DCGC combine sought to achieve its objectives[3] (P.A.17).

[3]After the District Court dismissed this case in April, 1975, the disbarment suit against petitioner Howell came to trial in state court during July, 1976. Judge Walker testified, described petitioner Howell as "a sick man," and stated that it was the consensus of opinion of the bench and bar in Dallas County that petitioner was mentally incompetent to practice law (P.A.25). The jury rejected Judge Walker's testimony and by special verdict acquitted petitioner on all counts. Special interrogatories were answered as follows:

"ONE: Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court Number 2 involving divorce, property and custody of minor children, Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3? ★ ★ ★ 'NO'"

"FIVE: Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court 2 involving custody of minor children, Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor chidren had been set by Judge Gibbs for June 2nd, 1971? ★ ★ ★ 'NO'"

"TEN: Do you find from a preponderance of the evidence that when Charles Ben Howell failed to answer a question relating to his motion for continuance which he was instructed by Judge Holland to answer, if you have so found, that he engaged in conduct that was prejudicial to the administration of justice? ★ ★ ★ 'NO'" **State v. Howell**, No. 74-9611-E, 101st Dist. Ct., Dallas Co. Tx. (Verdict, July 15, 1976).

In other words, the jury by its verdict not only acquitted petitioner on all counts, but it also directly impeached the contempt convictions previously entered against him.

Not withstanding the fact that the verdict was entirely favorable to petitioner, the judge who presided at the disbarment trial reprimanded petitioner for "conduct prejudicial to the administration of justice" and petitioner appealed the reprimand order. **Howell v. State**, No. 1,060, (Tx. Cv. Ap., Tyler Dist., docketed February 28, 1977.) Arguments have not yet been heard therein.

The complaint concludes with a prayer on behalf of plaintiff Howell and the class for injunctive relief plus damages, actual and exemplary (P.A.18).

The trial court held that even assuming everything pleaded was true, neither petitioner Howell nor the plaintiff class was entitled to recover anything whatsoever. Such holding is implicit in the District Court's order dismissing the complaint (P.A.19). The Court gave no notice, held no hearing and refused leave to amend. Petitioners asked leave to withdraw their case from litigation and voluntarily dismiss without prejudice, but the trial court also denied this request (P.A.22).

Petitioners presented seven separate issues on appeal, citing numerous authorities in support of each. On April 21, 1977, the Fifth Circuit affirmed, without opinion. The affirmance order was delivered on a mimeographed form routinely used by the Court for affirmance without opinion. The order refers to Fifth Circuit Local Rule 21 and the case of *NLRB v. Amalgamated*, 430 F. 2d 966 (5-NLRB 1970), wherein Local Rule 21 was instituted (P.A.23). A petition for rehearing en banc was filed protesting that this was not a proper case for the application of Local Rule 21, but the petition for rehearing was likewise denied without explanation (P.A.24).

REASONS FOR ALLOWING THE WRIT

QUESTION ONE:

THE SUPREME COURT SHOULD DECLARE THE CONSTITUTIONAL AND PROCEDURAL LIMITS UPON THE PRACTICE OF DECIDING APPEALS WITHOUT OPINION.

In *Rochin v. Ca.*, 342 U.S. 165 (1952), Mr. Justice

Frankfurter discussed the proposition that due process of law includes those procedures and practices that have been uniformly and traditionally followed over the year by quoting from Edmund Burke:

> " 'Your committee do not find any positive law which binds the judges of the courts in Westminister-hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land.' " *Id.* 170-171, *fn.*

How times have changed! Mr. Justice Frankfurter would hardly recognize the present day practice in the Courts of Appeals where droves of cases are now disposed of without opinion. Serious and wide spread concern has been expressed, but the practice continues to grow. While we see no question of a constitutional nature as long as the practice is limited to cases of a simple nature and those plainly without merit, the widening use of the practice does raise definite constitutional questions. Even further, serious questions of federal housekeeping are involved. The federal court system has long prided itself as a model for emulation by the various state systems. But, in the present instance, the federal courts themselves have been the leaders in the movement to throw out opinion writing even though many regard an explication of the Court's reasoning as a fundamental component of the right of appellate review. If the concept that the litigants have the right to receive an explanation of the appellate court's decision disappears from the American scene; if it becomes established that an opinion may be omitted at will, the

credit, or the blame, as one may view the situation, will lie entirely with the federal courts.

The no-opinion movement is well under way. Petitioners submit that it is time for the Supreme Court to look at the matter. This Court should fix reasonable guidelines and decide what minimum indications the Court of Appeals must give as the basis for their decisions. It is submitted that the present case, containing many serious issues, furnishes a suitable vehicle to explore the no-opinion practice.

ISSUES PRESENTED TO THE FIFTH CIRCUIT

Petitioner laid seven issues before the Fifth Circuit: "*First Issue*: The procedures followed by the District Court were in violation of the Rules of Civil Procedure, denied plaintiff class of an opportunity for the orderly presentation of their case, and deprived plaintiffs of procedural Due Process of Law guaranteed by the Fifth Amendment to the United States Constitution." (Apt. Br. 10-20)

Under this issue, petitioners set out that the case was filed on November 1, 1974 and over the next three and one-half months, respondents filed various motions and briefs, but none of them answered upon the merits. Seven weeks thereafter, the District Court dismissed without holding any hearing. Petitioners wrote a letter to the Court protesting the lack of an opportunity to be heard and requested that the Court enter an "order withdrawing previous decision and order and entering voluntary dismissal," a draft of which petitioners transmitted along with their letter of protest. When no immediate response was received from the Court, petitioners filed a motion for

amendment of the Court's findings, a motion that the Court grant plaintiffs leave to replead and a motion for new trial. All motions were overruled and petitioners' cause of action was as effectively terminated as if a verdict had been rendered finding every allegation to have no support of the evidence.

Petitioners cited to the Fifth Circuit almost two dozen decisions, plus rules and texts, in support of their propositions: (1) that the complaint was adequate under the liberalized federal pleading practice; (2) that, if the complaint were defective, the case could not be terminated for want of "specificity" without providing an opportunity to amend; (3) that petitioners had not been given such an opportunity; and (4) petitioners had neither been given reasonable notice nor a fair hearing upon their proposition. It was argued on the basis of such authorities that the complaint was, in fact, sufficient, that none of the parties asked any further statement of particulars, and that the Court had ordered none. It was contended to the Fifth Circuit that a complaint may not be dismissed for want of particularity unless there is no possibility that the plaintiff can recover under the allegations of his complaint. The leading case of *Conley v. Gibson,* 355 U.S. 41 (1957), was discussed wherein it was stated that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts" which would entitle him to relief.

> "*Second Issue*: The District Court should not have entered a judgment in bar of future litigation without giving notice to the plaintiff class and providing an opportunity to be heard." (Apt. Br. 20-24)
>
> Under this issue, petitioners pointed out that the

District Court failed to notice in its decision, or even in the caption thereof, that the case had been pleaded as a class action. Professor Wright's treatise and his textbook were both extensively discussed wherein it is stated that, if the pleadings so provide, the Court may not proceed without first determining if the case is properly maintainable as a class action and in issuing notice to the class. A decision of the Supreme Court and a decision of the Fourth Circuit were also discussed.

> "*Third Issue*: Plaintiffs have been denied the right of equal access to the ballot, a constitutionally protected interest. The District Court erred in holding that no relief may be had under the Civil Rights Statutes for official misconduct calculated to control the outcome of elections to office as state court judge." (Apt. Br. 25-32a)

Under this issue, petitioners again cited almost two dozen authorities, mostly from this Court, notably *Harper v. Va. Bd. of Election,* 383 U.S. 663 (1966), and *Bullock v. Carter,* 405 U.S. 134 (1972). All of the authorities cited were subsequent to the principal authority cited by the District Court, *Snowden v. Hughes,* 321 U.S. 1 (1943). A case from the Fifth Circuit, *Moore v. Harris Co. Commrs.,* 378 F. Supp. 1006 (3-Judge, S.D. Tx. 1974),[4] was cited wherein it was stated:

> "* * * It appears that events have marched by the view taken in *Snowden* * * *. More recent Supreme Court decisions have sapped the force of Snowden's vision of the federal structure," *Id.* 1008.

[4]Rvsd.oth.gds., 420 U.S. 77 (1975).

"*Fourth Issue*: The District Court erred in its holding that 'the logic which dictates that certain officials be immune from suit for actions taken in their official capacities flows not only to suits for damages, but to any injunctive relief which is sought as well.' " (Apt. Br. 33-38)

Under issue four, petitioners pointed out to the Fifth Circuit that, just as the District Court failed to notice the class action aspects of this case, it gave no indication in its original decision that it was aware of the fact that plaintiffs were seeking injunctive relief. In response to petitioners' motion for additional findings, the District Court ruled without discussion or citation of authority that respondents were immune not only to suits for damages, but to injunctive relief as well (P.A.24).

Petitioners argued to the Fifth Circuit that DBA is a private organization and no basis for immunity as to DBA had been suggested. Citing several cases, it was argued that prosecutors have been uniformly held liable to federal injunctive actions in literally hundreds of cases beginning with *Ex parte Young,* 209 U.S. 123 (1908), where the Supreme Court held that the attorney general of Minnesota could be enjoined from enforcing a confiscatory railroad rate schedule.

Concerning the defendant judges, it was argued that there are several limiting principles, but immunity is not one of them.

Petitioners cited seven authorities indicating that injunctive relief could be had against a state court judge in a proper case. It was argued that *O'Shea v. Littleton,* 414 U.S. 488 (1974), upheld in principle the proposition that injunctive relief could be had.

It was argued that the distinguishing feature of the case in hand is that petitioners were only seeking to enjoin the defendant judges from exerting illicit influence and from combining and conspiring with the members of DBA and DCGC to further their own personal and political ends. There is absolutely no prospect of intrusion into the business or operation of the state courts involved.

By supplemental brief, petitioners argued *Shore v. Howard,* 414 F. Supp. 379 (N.D. Tx. 1976), holding that state court judges while exercising their statutory function of hiring and firing probation officers were subject to suit for injunctive relief because they were acting as administrators rather than judges.

"*Fifth Issue*: The District Court erred in holding that the defendant members of the Dallas County Grievance Committee (DCGC) are entitled to prosecutorial immunity and that it had been established *to a certainty* that they did not act in excess of their immunity." (Apt. Br. 38-40)

Under this issue, petitioners frankly admitted that the principal question was the application of *Imbler v. Pachtman,* 424 U.S. 409 (1976).

Petitioners cited fifteen cases from the lower federal court's holding that the prosecutor had no immunity to a civil rights damage action under the facts stated. It was pointed out that in *Imbler,* the Supreme Court expressly declined to grant broad-based immunity to prosecutors and refused to overrule authorities denying immunity in different circumstances.

Petitioners pointed out to the Fifth Circuit that the complaint was drawn in November of 1974 and the dis-

missal order was dated April, 1975. Petitioners were never availed of the opportunity to attempt to plead a case that would not fall within the *Imbler* immunity rule and the District Court did not have *Imbler* before it when it announced its decision.

Petitioners argued to the Fifth Circuit that, at a minimum, inasmuch as the case must be returned to the District Court upon other issues, the case should be returned to the District Court so that petitioners might have an opportunity to amend as against the defendant members of DCGC.

> "*Sixth Issue*: The District Court erred in holding that there may be no damage action against the defendants, Judge Walker and Judge Leftwich on grounds that it had been established *to a certainty* that they did not depart from 'the sheltered zone of judicial jurisdiction.' " (Apt. Br. 40-54)

Petitioners presented to the Fifth Circuit substantially the same argument that is being presented to this Court under Question Two.

> "*Seventh Issue*: The District Court erred in holding that it had been established to *a certainty* that the defendant Dallas Bar Association (DBA) was not guilty of conduct that would subject it to liability under the Civil Rights Statutes, particularly §1985." (Apt. Br. 55-58)

Under this issue, petitioner argued that *Griffin v. Breckenridge*, 403 U.S. 88 (1971) was not restricted to suits "along racial or alienage class lines" as held by the District Court. It was argued that the Fifth Circuit had directly so held in *Westberry v. Gilman Paper Co.*, 507 F. 2d 206 (5-Ga. 1975). *Westberry* was urged to be correct in principle

even if it had been set aside as precedent. Seven cases were cited in support of the argument that *Westberry* states the correct rule.

By supplemental brief, petitioners presented the case of *Means v. Wilson*, 522 F. 2d 833 (8-S.D. 1975) expressly upholding §1985 jurisdiction over a suit alleging irregularities with respect to an Indian tribal election and expressly approving the reasoning stated in *Westberry*. It is to be pointed out that the type of election irregularities here sued upon differ but little from the irregularities alleged in *Means*.

GUIDELINES AND LIMITATIONS CONCERNING THE NO OPINION PRACTICE SHOULD BE ESTABLISHED AND ENFORCED

Just what reasoning impelled the Fifth Circuit to reject all of these issues and all of these authorities? Obviously, there is no means to divine the Court's thinking. Not even the Supreme Court is able to unlock the Court's bosom and discover why petitioners lost their appeal. Wherever litigants and their lawyers believe in the justice of their cause, as the vast majority of them do, a feeling of emptiness, frustration or even outrage is inevitable. In the wake of a "no opinion" decision, those who approached the Court with misgivings or suspicion, are certain to go away convinced that the decision was based upon bigotry and bias rather than upon the law.

> "The practice of delivering written opinions is * * * declining and now seems to be omitted in about 34 percent of decided cases at the Court of Appeals level. Some of the opinions shown as per curiam are actually only summary affirmances.

These trends are disturbing for they may erode the integrity of the law and of the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy." Bork, *Dealing With the Overload,* 70 F.R.D. 231, 233 (1976)

Mr. Bork's estimate appears to be conservative. According to a report of the Senate Judiciary Committee dated September 30, 1975, approximately 53% of all cases in the Fifth Circuit were, in the most recently completed fiscal year, disposed without opinion. High percentages were given for several others. *U.S. Sen. Rpt.* 94-404 (1975). The report expresses concern that the procedure if carried too far will undercut fundamental constitutional rights. It is stated that:

> "Our concept of due process imposes limits on the nature and on the extent of permissible shortcuts in the appellate process * * *," *Id.* 25

Minimal due process requires that a decision maker at any level confine itself to the record, to the evidence properly adduced before itself, to the applicable rules of law and to a sound exercise of discretion. Without any written statement from the decision maker, there is no assurance that these requirements are met. Such an explanation is an important feature of any judicial opinion.

> "Plainly * * * [letting counsel feel that the case has been dealt with carefully and fairly] is one function

> and no slight one; but surely at our present juncture an equally or even more important office is to *let the winner* (and incidentally, *the loser,* and not at all incidentally, *any member of the bar*) *get some working idea of what did the scoring for the victory.*" Llewellyn, *Common Law Tradition,* 290 (1960). (Emphasis in original.)

Rule 52(a), F.R.Cv.P. requires findings of fact and conclusions of law in all civil actions tried without a jury. Plainly, the object is to promote care on the part of trial judges to aid in the process of adjudication and to guide the appellate court on review. The trial court's findings must "afford a clear understanding of the ground upon which the court based its judgment." *Fluor v. Mosher Steel,* 405 F. 2d 823, 828 (9-Az. 1969). See also *Schneiderman v. U.S.,* 320 U.S. 118, 129-131 (1943).

Rule 23(c), F.R.Cr.P. provides that the defendant may request findings of fact when tried before the bench. The rationale, both civil and criminal, is similar; to require the trial court to analyze the case and articulate the grounds for its judgment. All judges are aware that this process sometimes convinces the court that its original, tentative conclusion was unwarranted.

Courts reviewing administrative determinations are acutely aware of the potential for abuse, the need to insure fairness and the need to facilitate judicial review by requiring statements of fact. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court held that minimal due process included a statement of reasons for the decision:

> "Finally the decision maker's conclusion as to a recipent's eligibility must rest solely on the legal rules and evidence adduced * * *. To demonstrate compliance

with this elementary requirement, *the decision maker should state the reasons for his determination and indicate the evidence he relied on,* * * *." *Id.* 271.

The same requirement has been restated with respect to revocation of parole proceedings.

> "Our task is limited to deciding the minimum requirements of due process. They include * * * *a written statement by the fact finders* as to the evidence relied on and the reasons for revoking parole." *Morrissey v. Brewer,* 408 U.S. 471, 488-489 (1972).

Decision by fiat is repugnant to due process whether the decision is rendered by an administrative or judicial tribunal. As Judge Jerome Frank wrote in *U.S. v. Forness,* 125 F. 2d 928 (2-N.Y. 1942):

> "The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standard." *Id.* 942.

Any person substantially hurt by a decision should be given the opportunity to know what is in the decision-maker's mind. Those who are denied the relief claimed by them deserve to know why. See Leflar, *Some Observations Concerning Opinions,* 61 Col. L.R. 810 (1961).

Traditionally, appellate courts, in well reasoned and thoughtful opinions, have apprised litigants of the court's reasons for deciding the case and by dint of painstaking justifications, the appellate courts have not only contributed to the development of the law but they have actually created the law. In turn, this procedure has in and of itself produced a viable appellate system. See *Llewellyn,* supra, 183, 195. The dilution of this practice to adjust to demands

for efficiency undercuts both public confidence and constitutional values.

Admittedly, opinion writing has been an unfortunate fatality of the litigation crunch. But, how far may the interests of the parties and the integrity of the courts themselves be sacrificed in the name of expediency? The Supreme Court, as the final arbiter of due process and as the guardian of the integrity of the federal judicial system must answer the question. It is historic that the legislative branch has dealt penuriously with the judicial one. Is it true that this country can no longer afford the high standards of justice for which it is renowned? We do not know but we are sure that the more that those standards are compromised, the less the resources that will be legislatively provided.

In search of solutions to the litigation crunch, the Commission on Revision undertook an extensive survey of attorney attitudes:

> "The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write 'at least a brief statement of the reasons for their decisions.' Quite consistently, the respondents rejected the proposition that reducing the number of opinions issued is the most acceptable way to avoid long delays. * * * Attorneys were unwilling to buy speed with what appeared to them to be a sacrifice in the quality of the judicial product or the integrity of the process.
>
> * * * * * * * * *

"Particularly striking is the fact that more than three-fourths of the attorneys questioned agreed that it is important for the courts at least to issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be insured that the attention of at least one judge was given to the case. If the lawyer's perceptions are to be credited, the risk of harm to public confidence in the judicial system from unexplained decisions could become serious.

* * * * * * * * *

"We recommend that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision." Comm. Rev. Fed. Ct. Appellate Sys., *Structure & Internal Procedures,* 49-50 (1975).

When 5-*Cir. Loc. R.* 21 was adopted, the Court undertook an exposition upon its applicability in *N.L.R.B. v. Amalgamated,* 430 F. 2d 966 (5-NLRB 1970). The particular case was described as involving a run-of-the-mill board order turning wholly upon credibility choices that were amply supported. We agree that little or no opinion writing should be required in such instance. However, the situation in *Amalgamated* is as different as night and day from the case in hand. The present case was extinguished by the District Court at the earliest pleading stage without notice, without hearing, denying leave to amend and denying the right to withdraw the case from litigation without prejudice. Such peremptory action can only be upheld in the narrowest of instances. Where the trial court has acted peremptorily, sound judicial administration requires that

the appellate court act more deliberately and carefully screen the case for error. In the present instance, the Court of Appeals has piled cursory disposition upon cursory disposition. Neither the fact situation found in *Amalgamated* nor the words of 5-*Cir. Loc. R.* 21 provide any basis for applying the no-opinion procedure to the present case.

Neither, petitioners respectfully submit, has the Fifth Circuit conformed its procedure in the present case to the standard which the Court promised to apply in the *Amalgamated* case:

> "But of decisive significance in each of these factors, singly or collectively, is the further judicial determination by the Court 'that an opinion would have no precedential value.'
>
> "It is here that the Court faces a heavy obligation. For as a part of the time-proved hierarchical system, this Court and each of its Judges must constantly bear in mind the distinctive role of an appellate court, particularly a United States Court of Appeals. Foremost, we are a court of review and in the Federal system a court of review of cases in which appeal is nearly always a matter of right, not a certiorari-type discretion. That means, of course, that we must consider in each case whether the outcome under review meets acceptable legal standards. But our role does not stop there even though to the parties it is the results we ordain which count the most.
>
> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than another

result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill considered or even arbitrary actions by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law — and particularly Judge-made law — grows." *Id.* 972.

If the Court has maintained fidelity to its own rule, then the Court has decided that an opinion in the present case would have no precedential value. Considering the number of serious issues raised by this case, petitioners cannot accept the proposition.

The first three subdivisions of 5-*Cir. Loc. R.* 21 are simple to understand and easy to apply. Subdivision (4) "that no error of law appears"; is extremely cryptic. At the same time, it is the only subdivision of the rule having any application to the case in bar. Since *Amalgamated*, the Fifth Circuit has applied *Rule* 21 literally hundreds of times but, as far as we can determine, it has never again undertaken to publish any further opinions commenting upon the standards for the application thereof. Neither are we able to find any rulings upon petitions for rehearing, en banc or otherwise holding that the Court did or did not err in omitting an opinion in the first instance. Having declared for itself high standards for the application of the Rule, we fail to find evidence that the Court has taken steps to enforce its own standards. As Mr. Justice Black has said, Self restraint is the hardest restraint of all. Insofar as the Courts of Appeals fail to restrain themselves and fail to place proper restrictions upon the no-opinion procedure, it is incumbent upon the Supreme Court to intervene.

Subdivision (4) of the Rule can be read so expansively that it constitutes a license to omit an opinion in virtually any case. However, if the provision is read in view of the *Fifth Amendment* and in light of the importance attached to the opinion writing function, it must be held that (4) is a narrow grounds for the dispensation of an opinion.

Petitioners believe that Subdivision (4) can only be interpreted as meaning *no seriously arguable* question of law. It has reference only to well established principles of law and their application to commonly encountered fact situations. Primarily, it is a tool to weed out the routine and the repetitious. The case in hand simply does not fall into any such category.

Undoubtedly courts must deal effectively with the rising tide of appeals. But efficient procedures may not always be just. "The Constitution recognizes higher values than speed and efficiency." *Stanley v. Il.*, 405 U.S. 645, 656 (1972).

Moreover, part of the task of judicial opinions is to insure the acceptance of the system of law in the society it governs. *Leflar*, supra, 812. From a narrower standpoint it is particularly desirable that the expectations of the legal community be realized. For "when your rooters stop rooting, your constituents lose ardor and even the general public begin to mutter" a crisis of confidence may develop. *Llewellyn*, supra.

If the above mentioned survey of attorney's values is valid, there is a great risk that confidence in the judicial system may be affected by unexplained decisions.

Unquestionably the use of affirmances without opinions "is certainly not to be encouraged other than

clearly deserving cases." Haworth, *Screening & Summary Procedures,* 1973 Wash. U.L.Q. 57, 72. Anything less than carefully controlled selective employment of the decision without explanation device leaves litigants with the impression that the result was reached by fiat, possibly without a clear understanding of the issues by the court itself. Comm. Rev. Fed. Ct. Appellate Sys., *Opinion Writing,* 7 (1974).

We need to point out that the Fifth Circuit has two no-opinion rules, not just one. 5-*Cir. Loc. R.* 20 provides that "if it appears that the appeal is frivolous and entirely without merit," the Court may peremptorily dismiss. Such rule is in keeping with long standing and widely used appellate practice. No substantial argument can be raised against *Rule* 20. Courts will not waste their time on patently worthless cases. But, the mere existence of *Rule* 20 serves to underscore the fact that *Rule* 21 was not designed with the trivial case in mind. It was designed to handle cases which go beyond the threshold of frivolousness but which the Court nevertheless deems not to warrant the benefits of full review. The parameters of *Rule* 21 are bound to be difficult of ascertainment. However, such fact provides no justification whatever for its wholesale usage.

We would also point out the statement of the Committee on Appellate Court Energies that arguments in favor of requiring the writing of opinions are distinct from the question whether those opinions should be published. It has firmly endorsed "the principle that all appellate decisions should be rendered in writing and that they should be sufficiently definitive to inform the parties of the court's reasoning." Comm. on Use of Appellate Energies, *Standards for Publication,* 2-3 (Fed. Jud. Cnt. 1973).

Nor do we believe that the question being argued was disposed of in *Taylor v. McKeithen,* 407 U.S. 191 (1972). We agree that the courts of appeals should have "wide latitude in deciding when and how to write opinions." Neither do we think 5-*Cir. Loc. R.* 21 facially deprives any constitutional rights or any other important rights. On the other hand, petitioners urgently submit that judicial discretion is not the equivalent of judicial license. Neither do we think that 5-*Cir. Loc. R.* 21 and particularly its subdivision (4) is self-defining nor that it may properly be invoked strictly at whim.

Even more importantly, *Taylor v. McKeithen* was decided without argument. According to the case summary, 40 U.S.L.W. 3356 (filed 12/13/71), the Fifth Circuit's failure to write an opinion was not even questioned in the petition for certiorari.

This Court there concluded that the failure to write an opinion hampered the Supreme Court in its own disposition of the case and for such reason alone, the Fifth Circuit was directed to prepare an opinion. See also *Northcross v. Bd. Ed.,* 412 U.S. 427 (1973). From the discussion and the authorities just presented, such is but a single facet of the no-opinion problem. Petitioners join with the two out of every three American lawyers believing that the Due Process Clause requires an appellate court to indicate the grounds for its ruling, save, perhaps, in a completely pedestrian situation; certainly not comparable to the case in bar.

In a constitutional sense, the right of appeal is an extremely valuable right. It has been so held, both in a criminal, *Griffin v. Il.,* 351 U.S. 12 (1956) and in a civil, context. *Lindsay v. Normet,* 405 U.S. 56, 77 (1972).

Llewellyn has characterized the appellate courts as the "central and vital symbol of The Law." *Ibid.* 4. Over 150 years ago it was declared:

> "In order to guard against the fallibility of the human understanding and to shield the citizen from the attacks of injustice, it may be regarded as a cardinal principle in our land, that no single tribunal is entrusted with the sole determination of a man's property." *Yates v. People,* 6 Johns. 337, 455 (N.Y. 1810).

It follows that any substantial departure from "the course [that] hath prevailed from the oldest times," *Rochin v. Ca.,* supra, must be carefully supervised and proper guidelines imposed.

All states have recognized the importance of appellate review and by constitution, statutes and decision have provided for the plenary application thereof. In the federal system, "all final decisions of the district courts" are reviewable in the courts of appeals as a matter of right, 28 *U.S.C.* §1291; *Coppedge v. U.S.,* 369 U.S. 438, 448 (1962).

The Fifth Circuit itself has agreed with the argument just presented:

> "The Court recognizes that it must — the word is must — never apply the Rule to avoid making a difficult or troublesome decision or to conceal devisive or disturbing issues. This means that while Rule 21 should make a real contribution to the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used." *N.L.R.B. v. Amalgamated,* supra, 972.

The case in bar has obvious "sticky" elements. It is the type of case that many judges would prefer to see on some other judge's docket. Texas judges are elected by the

ordinary political party ballot at general elections. Petitioner Howell is a perennial minority candidate for judicial office in Dallas County, Texas. On Tuesday, October 29, 1974, exactly seven days before election, petitioner was sued for disbarment. A jury later exonerated him of all charges, but the acquital came long after election day where plaintiff Howell, in the midst of adverse publicity generated by the mere filing of the disbarment, went down to defeat. Petitioner brought the instant lawsuit as a class action against two state district judges, the local Bar Association and the individual members of the Local Grievance Committee. He complained of the disbarment as a form of political activity expressly calculated and timed to defeat his candidacy. In support of the class-action claim, it is charged that an on-going conspiracy exists against all candidates who do not have the blessing of the local Bar Association hierarchy. The complaint states that during the 1970 campaign season, another politically inspired disbarment was filed against another anti-establishment candidate for local judicial office. The complaint also charges that the Bar Association has been conducting a politically slanted poll and that it is advertising and promoting its chosen candidates with income tax deducted membership fees. Insofar as these activities are financed by pre-tax earnings, the United States Treasury is being forced to contribute to defendants' unlawful activities. The plaintiff class seeks to prohibit future discriminatory activity of the nature pleaded against non-establishment candidates for judicial office.

Petitioners have presented seven issues to the Court of Appeals, all buttressed by numerous authorities. The Court of Appeals has rejected them all, out of hand. Does

the action of the Court of Appeals comply with the requirement for:

> "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights?" *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

It has been truly said that familiarity breeds contempt and also that power increases with the exercise thereof. 5-*Cir. Loc. R.* 21 was created with the finest objectives in mind. The principles governing its use as illustrated by and discussed in *N.L.R.B. v. Amalgamated* are most commendable. Unfortunately, hundreds of cases later, it appears that the Fifth Circuit has not continued with the process of refining those principles nor has it implemented procedures whereby any tendency toward improvident use of the Rule may be checked.

The need has arisen for the Supreme Court to implement standards and guidelines of its own and to provide provide some enforcement of the same. The enforcement should not be difficult. Wherever the Supreme Court determines that the case may not be disposed of without opinion, it need only vacate and remand. Petitioners leave only this concluding caveat: Circuit judges are human beings possessed of all the normal weaknesses of the flesh. Surveys reflect that in the vast majority of instances lower courts have found new grounds to re-instate their previous judgment after this Court vacates and remands.

When a case is vacated and remanded because the Court of Appeals erred by omitting an opinion, it is all too easy for the Court of Appeals to imply a personal criticism from its prior handling of the case. The temptation to

convert the opinion writing function into an exercise in self-justification is obvious and the total lack of any prior indication as to the Court's thinking leaves ample room to engage in that all too human tendency. This case and any other cases remanded for failure to prepare an opinion should be accompanied with the instruction that the case be heard anew by another panel. The panel on remand should be instructed to independently reach its own judgment as well as to deliver an opinion in support thereof. Any lesser relief will too often prove illusory. Likewise, the present case should be considered de novo by another panel of the Fifth Circuit.

QUESTION TWO:

JUDICIAL IMMUNITY TO DAMAGES IS NOT ABSOLUTE UNLESS THE ACT WAS ABSOLUTELY JUDICIAL.

In our democracy, there is no such thing as truly absolute immunity to damages. As a constitutional principle, there can be no immunity beyond that which is necessary to the discharge of the office. Accepting the foregoing as our axiom, we postulate as follows:

(1) Absolute immunity has no application unless the complained act was of a strictly judicial nature.

(2) Nor does absolute immunity have any application if the judge acted in excess of all jurisdiction.

The cases established both limitations although the second limitation has been articulated more frequently than the first and some of the cases appear to consider that

the first limitation is included within the second. Petitioners present that both limitations are here applicable.

It is next presented that thoughtful analysis of the cases will make it clear that judges are not governed by a single standard of immunity. Beyond doubt, *there are two wholly separate standards of immunity applicable to judges*:

(1) With respect to orders, judgments and decrees *of a judicial nature* (emphasis: of a judicial nature) pronounced ex cathedra and in the course of a judicial proceeding where jurisdiction is present, judges are possessed of a so-called "absolute" immunity, meaning that they are not answerable in damages even if they acted out of malice and with corrupt purposes.

(2) With respect to *other conduct* which is arguably related to the duties of their office, judges are only possessed with the immunity applicable to public officials in general. This so-called "qualified" immunity provides that if the official has been empowered with discretion with respect to the particular matter, he is not liable for his errors so long as he acted in a reasonable manner and believed in good faith that he was entitled to so act.

The bulk of the reported cases rejecting attacks upon judges concern the orders, judgments and decrees entered by them and the above distinctions not being material, those cases often fail to note the existence of *two immunities rather than one*. However, there are a number of cases holding that judges are not entitled to so-called "absolute" immunity when they were not carrying out a strictly judicial function. The defendants, Judge Walker and Judge Leftwich do not come within the absolute immunity rule because the case in bar involves no order, judgment or

decree of a judicial nature. If either of them issued any order, judgment or decree whatever commanding DCGC to commence proceedings against any plaintiff or attempted by any such order, judgment or decree to control the conduct of DCGC in any manner, (as a judge might order a grand jury to investigate a certain matter or order a prosecutor to prepare a bill of indictment) we are not aware of it. Even further, if they did so, *they were acting in the clear absence of all jurisdiction,* for Texas law does not give to trial judges any control or supervisory power over grievance committees. *State ex rel. Chandler v. Dancer*, 391 S.W. 2d 504 (Tex. Civ. App. 1965): application for writ of error to Texas Supreme Court refused, docket notation, "no reversible error" (n.r.e.), 40 *B Tx. Dig.* 322. Exclusive supervision of the grievance machinery is vested in the State Bar and ultimately, the State Supreme Court.

It is to be emphasized that no disbarment proceedings in the Howell case ever took place in the courtroom of either defendant judge nor did either of them ever attempt to preside over any such proceedings. The gist of this complaint is the use of the prestige and influence of their offices to intermeddle in proceedings over which they had no capacity to preside and no jurisdiction to enter any type of judgment, order or decree therein. This suit is for conspiring and for illicitly using the influence of their offices to cause the practicing attorneys who make up DCGC to institute disbarment proceedings calculated to chill, inhibit and defeat candidacy for state judicial office.

We think the term "absolute" immunity to be a misnomer. In medieval England, the King truly was absolutely immune to suit and the judges, to a substantial extent, declared themselves entitled to share that immunity as a perquisite of their office. See dissent of Mr. Justice Douglas,

Pierson v. Ray, 386 U.S. 547, 565 (1967). Needless to say, any such theory of judicial immunity is wholly unacceptable in a democratic society. *Article I, Sec. 9(a)* of the Constitution prohibits the bestowal of titles of nobility and privileges of office are equally repugnant. In America, there is no such thing as absolute immunity. Claims of immunity directly and necessarily serve to defeat the command of the Civil Rights Acts that *"every person"* is liable for depriving the civil rights of another. In *Pierson*, the Supreme Court said that the doctrine of immunity is to be sparingly applied in civil rights cases. It must be limited strictly to that which is necessary in order to carry out some higher policy. Immunity may be no broader than the considerations of policy upon which it is based.

We have re-read *Pierson v. Ray,* supra, several times over. The Supreme Court emphasized that the defendant-judge acted strictly within the traditional role of a judge and the suit sought to recover for wrongfully entered orders, judgments or decrees of a judicial nature. *Pierson* goes no further than re-affirm that a judge is immune from damages for "holding court."

In the present case, the District Court held *Pierson v. Ray* applies but as the Court below pointed out itself, *Pierson* did no more than hold that in civil rights actions, judges may claim "the traditional immunities." An analysis of the traditional concept of judicial immunity must be made. In *Pierson*, the Supreme Court started with *Bradley v. Fisher,* 13 Wall. (80 U.S.) 335 (1871), where a judge at the conclusion of a trial, summarily entered a disbarment order against an attorney. Held, even though the appellate court set aside the disbarment order, the defendant-judge was possessed of so-called "absolute" immunity because the order was one of a judicial nature and he was not acting

in "the clear absence of all jurisdiction over the subject matter," *Id.* 351.

In *McAlester v. Brown,* 469 F. 2d 1280 (5-Tx. 1972), the Fifth Circuit apparently considered the defendant-judge to have been "holding court" when he caused the plaintiff to be jailed.[5] We agree that if the order for arrest was an order, judgment or decree of a judicial nature and not clearly in excess of the court's jurisdiction, then the absolute immunity rule applies. However, the Fifth Circuit literally jumped from this unassailable premise to the conclusion that the defendant judge complied with all jurisdictional prerequisites of a valid contempt conviction, a proposition that petitioners do not accept. It is true that a judge may summarily convict for contempt when he personally witnessed all elements of the offense. But due process still requires that a judgment be pronounced ex cathedra, not shouted in the hall, that it give minimal specification of the misconduct being adjudicated, that it specifically declare that the defendant is being convicted of contempt, that the judgment be promptly enrolled in the court records and that process for commitment to prison issue thereon. None of this was done. Mere defects in the performance of these functions can be dismissed as procedural irregularities but when the procedural omissions or defects are so gross as to rob the proceedings of a judicial nature, a clear want of jurisdiction exists. We think the pronouncement and enrollment of the judgment and the issuance of process thereon to be the essence of an enforceable judgment. The ex post facto adjudication was a transparent attempt to manufacture defensive evidence; at least, a fact issue existed in this regard.

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[5]For an insight concerning the defendant judge, see **In Re Judge Brown, 512 S.W. 2d 317 (Tex. Sm. 1974).**

In short, the pivotal question in *McAlester* is whether the conduct of the defendant judge so far departed the accepted course of a judicial proceeding that he clearly exceeded all jurisdictional prerequisites to a valid conviction of contempt. It is obvious that the Fifth Circuit did not even reach the heart of the matter.

McAlester cannot be reconciled with the recent case of *Sparkman v. McFarlin*, 552 F. 2d 172 (7-Il. 1977). The defendant judge there ordered the plaintiff while under age to be sterilized on application of her mother. Neither the pleadings nor the judgment were made part of the court records. No process was issued for the child nor was a guardian ad litem appointed. Held: absolute immunity is not available because of the gross departure from the basic minimums of accepted legal procedure.[6]

The defendant judge in *Sparkman* has asked the Supreme Court for certiorari, *McFarlin v. Sparkman*, No. 76-1750, 45 U.S.L.W. 3740 (filed June 8, 1977). Petitioners suggest that certiorari be granted both in the present case and in *Sparkman* so that judicial immunity may be explored in a broader scope. The law of official immunity as applied under the Civil Rights Acts is in a state of flux. The immunity of judges has only been considered by this Court one time in this century, and the *Pierson* case did not attempt to posit any instances when the rule of absolute liability might be inapplicable. The *Howell* case heard and

[6]Petitioners are unable to subscribe to the grounds first stated in the Seventh Circuit's opinion. Even if a judge should rule directly contrary to clear and undistinguishable precedent, he has only erred as to the substantive law and appeal is the only relief. However, the failure to bring the child before the court or to appoint a guardian, deprived her of the opportunity to defend against a substantively insupportable ruling or to seek relief on appeal. We urge that liability can be predicated upon the fact that the court failed to obtain any jurisdiction whatever over the proceedings.

decided along with *Sparkman* will afford the opportunity to fully examine the rule.

In *Manning v. Ketcham*, 58 F. 2d 948 (6-Ky. 1932), a judge undertook to hold an investigation concerning the receipt of threatening letters by various persons including himself. He called the plaintiff as a witness and when plaintiff refused to testify, defendant judge remitted him to jail for contempt. Held, the proceedings were completely without statutory basis. Held also, the defendant judge has no immunity because of a "clear absence of all jurisdiction." The case conflicts with *McAlester* and comports with *Sparkman*.

In *Picking v. Pa. R.R.*, 151 F. 2d 240 (3-Pa. 1945), the complaint declared that the defendant justice of the peace refused to hold a hearing as to the lawfulness of plaintiff's confinement in furtherance of a "conscious design" and conspiracy. Held, that he has no immunity for wilful refusal to exercise his office. The court's conclusion that judicial immunity was not an available defense under the Civil Rights Act is obviously contrary to *Pierson v. Ray*. However, plaintiffs submit that the result is correct. While a ruling that the party is not entitled to a hearing is to be distinguished as a judicial act, neither a calculated failure to act nor a point blank refusal to hold a hearing, whether or not veiled by subterfuge, constitutes an order, judgment or decree of a judicial nature. Immunities must be restricted to the considerations that spawned them. Where a judge refuses to hold a hearing, he should be relegated to his secondary immunity based upon reasonable conduct and good faith.

In *McShane v. Moldovan*, 172 F. 2d 1016 (6-Mch. 1949), the defendant justice of the peace conspired with the com-

plaining witness, a constable and others, caused plaintiff to be arrested without warrant and packed the jury with disqualified persons. Held: It was error to dismiss the complaint. The question as we see it is first whether a mere command for the plaintiff's arrest, in the absence of a warrant, constitutes an order, judgment or decree of a judicial nature and second whether conspiracy is actionable as an independent tort. The case could have gone off on clear absence of all jurisdiction; the tests frequently overlap.

In *Yates v. Hoffman Estates*, 209 F. Supp. 757 (N.D. Il. 1962), the defendant police magistrate issued a warrant for the arrest of plaintiff's corporate employer and directed the police to arrest plaintiff upon the warrant although plaintiff was not named therein nor charged with any offense. The claim of immunity was denied for reasons which are applicable here:

> "Not every action by a judge is in the exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse. * * * And it is not a judicial function in this State for a magistrate to direct a police officer to arrest and to take into custody a person not named in a warrant * * *."

The ruling is comparable to the ruling in *Manning v. Ketcham*, supra, and also strongly comparable to the rulings concerning prosecutorial immunity in *Hampton v. Chicago*, 484 F. 2d 602 (7-Il. 1973); *Madison v. Purdy*, 410 F. 2d 99 (5-Fl. 1969) and *Lewis v. Brautigam*, 227 F. 2d 124 (5-Fl. 1955). *Hampton* was written by Mr. Justice Stevens while on the Seventh Circuit.

Those cases hold that when a prosecutor commands or

directs action by the police or similar officers, he has only the secondary or qualified immunity of the officer, tested by reasonableness and good faith. With respect to judges, there is no basis in logic for a different test unless the judge's command to the officer be found to constitute an order, judgment or decree *of a judicial nature*. The distinction is eminently valid. When a judge receives evidence of probable cause and issues a warrant commanding an arrest, it would necessarily be a direct attack upon his exercise of *judicial discretion* to allow suit against him for damages. On the other hand, it simply is not a judicial act for a judge to point a finger and shout for arrest. Such gross departure from the accepted course of a judicial proceeding, simply does not involve the exercise of discretion *of a judicial nature*. We can conceive of no considerations of policy which would justify the application of the absolute immunity rule (meaning that there may be no recovery even for bias and corruption) where the case involves such departures from ordinary due process minimums.

Does this mean that the judges in *McAlester and Sparkman* have no defense? Are they automatically liable for causing one plaintiff to be thrown into jail and the other to be sterilized, both without hearing or process? Petitioners do not so argue. Instead, petitioners only argue that the defendant judges should be relegated to the second standard of immunity, the standard of qualified immunity. Applying qualified immunity to such acts comports with the policy of the Civil Rights Acts which is to limit, not expand the concept of immunity. If the governor of Ohio has only qualified immunity when he commands an arrest, *Schuer v. Rhodes*, 416 U.S. 232 (1974), a judge should not expect a greater shield unless his command is contained in an order, judgment or decree of *a judicial nature*. To impeach

the latter constitutes an impeachment of judicial discretion. To question the former only constitutes the re-examination of administrative discretion. *Schuer* establishes that administrative discretion is only protected by limited or qualified immunity. The identity of the actor as a judge rather than a governor should not vary the case.

Yates v. Hoffman Estates, supra, further states that *intentional torts* are not shielded by the higher immunity. If the entire tort consisted of the malicious and corrupt award of a $10,000 judgment when no logical construction of the pleadings, the evidence, and the verdict would support more than $1,000, then we would be inclined to disagree with *Hoffman.* But, wait a second!! Assume that an agreement between the judge and the plaintiff to split the extra $9,000 be uncovered. See *In re Judge Bates,* —— S.W. 2d ——, 20 Tx. S. Ct. J. 452 (No. B-6451, July 11, 1977). In our opinion, the case has changed entirely. This is a conspiracy, an independent tort; conduct other than an order, judgment or decree of a judicial nature; conduct for which no logical reason to erect the shield of immunity can be advanced. The judge must be held liable to suit for this *independent tort.*

Defendants Walker and Leftwich are charged with conspiring with the other defendants to influence the outcome of an election; independently tortious conduct. Plaintiffs have been cut off from their proof by precipitous dismissal. We submit that conspiracies simply are not judicial acts and there is no immunity. Reversal must be had to develop the nature of the claim.

Without taking evidence, the District Court apparently decided to acquit defendants Walker and Leftwich on the grounds of good faith stating that their acts were "perceived

to be necessarily taken * * * in order to protect the integrity of the state courts," (P.A.20). Perhaps it was the general feeling of the District Court that the defendant-judges did no more than to present good faith complaints to DCGC. We agree that the judge or any other citizen who does no more than make a good faith complaint to a prosecutor or a grand jury or a grievance committee is entitled to a judgment in his favor upon a state law action of malicious prosecution or upon a federal law civil rights action. However, federal courts do not act upon hunches or generalized feelings. The District Court has made findings of fact in a case where jury has been demanded (P.A.18) *without even hearing the evidence.* But, our point goes further. A decision to complain to the grand jury or the grievance committee is a deliberate act and a reasoned decision, but it is not an order, judgment or decree of a judicial nature. A person making false statements to induce a prosecution, be he prosecutor, police official, or citizen, has qualified immunity only. A judge's immunity in the same circumstance should be no greater.

We cannot emphasize too strongly the proposition that a judge who acts in the clear absence of all jurisdiction should still be protected by his second or lesser or qualified immunity. For this reason, *Picking, Manning, McShane* and *Yates* are all sound cases. By the same measure, *McAlester* is unsound while *Sparkman* is sound. While each of those defendant-judges may have considered themselves to be engaging in "acts perceived to be necessarily taken * * * to protect the integrity of the state courts," there can be no doubt that none of them, nor the defendant-judges now in bar, had any statutory authority to act as they did. Thus, they were wholly in excess of their jurisdiction and they

may only be discharged if they can make a showing of good faith.

The foregoing analysis is confirmed by *Spires v. Bottorff*, 317 F. 2d 73 (7-Ind. 1963), where defendant-judge, after having disqualified himself, wrote letters to the warden allegedly for the purpose of depriving petitioner of a fair hearing on his coram nobis proceeding. This is the same type of attempt to influence which has been alleged against defendant-judges, Walker and Leftwich:

> "Defendant as a judge possessed power by virtue of state law which clothed him with authority of state law and made it possible for him to do what he is charged with doing * * *. He did not, by disqualifying himself become any less a judge and without the state authority he had, he could not have been as effective in interferring, as charged, with petitioner's right to an orderly and fair hearing."

Another case, factually quite close to the case in hand is *Harris v. Harvey*, 419 F. Supp. 30 (E.D. Wi. 1976). The defendant judge was there accused of having conducted a campaign to force the dismissal of the plaintiff police lieutenant. The campaign by defendant Judges Walker and Leftwich to force the disbarment of plaintiff Howell and thereby deprive him of his occupation as a lawyer is strikingly similar.

Petitioners urge that the immunity pertains not to the office but to the particular activity pleaded against the defendant judge. Immunity is not a perquisite of the office. Instead, it flows from the policy against allowing challenge of the particular activity alleged against the particular defendant.

The proposition was well stated in *Lynch v. Johnson*, 420 F. 2d 818 (6-Ky. 1970), where the defendant-judge of probate was also by law the presiding officer of the county fiscal court. The defendant-judge was held not to be entitled to "absolute" immunity for causing plaintiff to be removed from a fiscal court hearing and lodged in jail:

> "A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum, either."

It was held that the defendant might be entitled to qualified immunity or might have a defense on the basis of a good faith belief that his actions were lawful, but he was not entitled to that higher immunity that protects both malice and corruption. Such a rigorous standard of immunity is unnecessary except in protection of the extensive discretion couched in an order, judgment or decree of a judicial nature.

In *Wade v. Bethesda Hospital*, 357 F. Supp. 671 (S.D. Oh. 1971), the defendant-probate judge decided that plaintiff was a feeble-minded person and ordered her to be sterilized. He was held to be liable because "there was no set of circumstances or conditions under Ohio law which would permit defendant Gary to order plaintiff to submit to sterilization." There was a clear absence of all jurisdiction. The parallel to *Sparkman v. McFarlin* is obvious.

In *Lucarell v. McNair*, 453 F. 2d 836 (6-Oh. 1972), a party was before a referee of the juvenile court concerning a traffic violation. He became involved in an altercation with that officer who caused him to be placed in jail. Held: No immunity. Compare *McAlester v. Brown*, supra. Paraphrasing the District Court below, the fact that the

defendant may have "perceived" his acts to be necessary "to protect the integrity of the court" only constitutes the defense of good faith.

In *Gregory v. Thompson,* 500 F. 2d 59 (9-Az. 1974) (Justice of Peace forcibly removed plaintiff from court resulting in civil rights complaint for assault), the Court expressly distinguished *McAlester v. Brown.* The Court considered *Bradley v. Fisher,* plus the *Lucarell, Lynch, Spires* and *Wade* cases discussed above and other authorities. It concluded:

> "Our inquiry must be to whether Judge Thompson acted in the clear absence of all jurisdiction. Appellant contends that a judge has the inherent power to maintain order in the courtroom * * *. He claims, therefore, that his assault * * * was at most in excess *of his jurisdiction* * * *.
>
> "This argument misses the mark. When courts have spoken of immunity for acts within the jurisdiction of a judge, they have declared that the doctrine insulates judges from civil liability 'for acts committed within their judicial jurisdiction,' or 'for acts within (their) *judicial* role,' [citing *Pierson & Bradley*] * * * Thus *judicial immunity does not automatically attach to all categories of conduct in which a judge may properly engage, but only to those acts that are of a judicial nature.*
>
> "What constitutes conduct falling within that range must, in large part, be determined by looking at the purpose underlying the doctrine * * *. Immunity is thought necessary to insulate judges from intimidation that might rob them of the independence so crucial to

> the public's interest in principled and fearless decision making.
>
> * * * * * * * * *
>
> "The Supreme Court has made it clear that the doctrine of immunity should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose * * *.
>
> "It is within a judge's power — indeed, it is his obligation — to 'protect the sanctity and dignity of . . . courtroom proceedings . . .' * * *. A judge's criminal contempt power provides him with the judicial muscle to cope with such situations, and the exercise of that power, clearly judicial in character falls within the scope of the immunity doctrine * * * It may even be necessary in an isolated instance to use physical force to preserve order. Though necessary, that does not mean the judge is immune. The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. A judicial act within the meaning of the doctrine may normally be corrected on appeal. * * * [citing *Pierson*] But when a judge exercises physical force in a courtroom, his decision is not amenable to appellate correction. * * * The purpose of the judicial immunity doctrine — to promote 'principled and fearless decision-making' will [not] suffer in the slightest if it is held that judges who physically assault persons in their courtrooms have no automatic immunity."

The Court thought that *McAlester* was distinguishable, but for reasons stated, petitioners believe the distinctions

to be thin, or nonexistent. In any instance, we submit *Gregory* as the better reasoned authority. Assume that a judge while on the bench and conducting a proceedings, orders the bailiff to remove someone from the courtroom. The bailiff uses unnecessary force causing that person to fall down the courthouse steps. Assuming that the judge did nothing other than issue the order, the judge is protected by his absolute immunity. Even assume that the victim is a newspaper reporter for whom the judge harbors a seething hatred on account of certain news items and that, on the occasion in question, the reporter had done utterly nothing to warrant his ejection. Even bearing in mind the constitutional guaranty of open courts, our thinking is that the order, judicially and regularly made is insulted by the absolute immunity rule. To hold otherwise is to predicate liability *upon the exercise of judicial discretion.*

Let us analyze the situation further. Can the bailiff claim absolute immunity on grounds that he was judicially ordered to eject the party? Obviously not!! He acted in excess of his authority by using unnecessary force. *Monroe v. Pape,* 365 U.S. 167 (1967). His only immunity is a qualified one.

Again, changing the facts somewhat, assume that the judge called from the bench three times ordering the bailiff to eject this person but the bailiff was out of earshot. The judge thereupon descends from the bench and throws the person down the courthouse steps. Can the judge claim his absolute immunity while he was performing the non-judicial function of carrying out his own order? *Gregory* says "no", and the foregoing analysis reflects it to be eminently correct. When a judge performs a non-judicial act, he only possesses the immunity pertaining to the act;

the immunity which the bailiff would have possessed. This is not an attack upon the exercise of judicial discretion. It is an attack upon conduct which does not involve the exercise of judicial discretion and in such instance there is no basis for the absolute immunity required in order to promote fearless decision making.

Altering the circumstances again, assume that the bailiff performs the ejection, but a witness appears who overheard the judge say to the bailiff in chambers, "The next time that * * * newspaper reporter comes into my court, I am going to order you to remove him from the courtroom and I want you to kick his * * * all the way to the bottom of the courthouse steps." Can the judge claim his absolute immunity in this instance? The answer is critical because the parallel to the case in hand is ever closer.

Petitioner urges the answer to be negative. If the judge had done nothing except to act judicially, he would have the higher immunity of the judiciary. But the sub-rosa command issued in chambers simply is not a judicial act. This may be a command issued by a judge but it was issued in the clear absence of all jurisdiction. To sue upon this command is not to attack the exercise of discretion of a judicial nature. Similarly, the acts of the defendant judges before the bar in conspiring with DCGC members for political gain, just as clearly were not judicial acts and carry no absolute immunity with them. These judges had no disbarment case or similar proceedings before them. The law of Texas does not even afford to them any supervisory jurisdiction over grievance committees. They are immune from the presentation of factual complaints made in good faith; just as all citizens have a qualified immunity when they present a complaint to the authorities. Defen-

dant judges have no further immunity because of the clear absence of all jurisdiction. Putting the matter in slightly different language, no order, judgment or decree *of a judicial nature* is involved.

May we present another hypothetical? Various laws commonly give to judges the authority to hire, to fire and to supervise various court personnel. See *Shore v. Howard*, supra. Assume that suit is brought against a judge claiming sex discrimination. May the judge plead absolute immunity to the claim for back wages? The only proper answer is "no". The order by which the clerk was fired was an administrative order (even if enrolled in the judicial records) and the immunity attaches not to the office but to the nature of the act complained of. Likewise, the present suit does not seek damages for acts of a judicial nature committed within the jurisdiction of the defendant judges.

In summary, the cases ask two questions: (1) Is the defendant judge being sued for the entry of an order, decree or judgment of a judicial nature? (2) If so, was he acting clearly in excess of his jurisdiction? If the answer to the first inquiry is negative or the second is positive, then he is not entitled to the fearsome shield of so-called "absolute" immunity or judicial immunity, although he may be possessed of a good and valid defense in the second or qualified or lesser immunity based on reasonableness and good faith. The fact that a defendant-judge may have "perceived" his acts to be proper and within the scope of his duties is clearly a defense. However, (and this is the point which we respectfully submit that the District Court completely missed) *whether the judge might reasonably have "perceived" his acts to be necessary, is not, by all the cases, the test of "absolute" immunity.* There is no pretense

that these defendant-judges are being attacked for the entry of any order, judgment or decree *of a judicial nature.* It follows as the night the day that they have no claim to the higher standard of immunity necessary to protect principled and fearless decision making.

Immunity even for malicious and corrupt acts is an immunity of the most outrageous sort; that is, unless it is strictly confined to its necessary application. *Gregory* emphasizes a point which also was made in *Pierson*. When a judge acts judicially through an order, judgment or decree, his errors may be corrected on appeal. Those who are dissatisfied with the judge's rulings may not have personal recourse against the judge; a judge could not return principled and independent decisions if he were continuously concerned that he might have to answer personally to those who might overturn his rulings. The doctrine of judicial immunity is a necessary concomitant to the right of appeal. On the other hand, the right of appeal is the ameloriative doctrine which promises relief from the otherwise harsh rule of "absolute" judicial immunity.

This Court knows well that the judges of state courts, if they are so inclined, can exert powerful persuasion upon members of their local bar. A state court judge who singles out a particular attorney for repeated favor can make that lawyer most prosperous. On the other hand, a state court judge who singles out a local attorney as the subject of his wrath can virtually drive that lawyer out of the profession or out of the community or both. This is the type of conduct with which the defendants Walker and Leftwich stand charged; exerting the subtle influences of their office upon the lawyer-members of DCGC for the purpose of political gain. The evidence has not been heard. However, it is clear

that they were not engaged in judicial decision making; their conduct is not the sort that is subject to review on appeal. Their immunity is of the lesser or qualified type.

The Civil Rights Statutes have proved again and again to be a powerful safeguard against official lawlessness. Running back at least as far as *Monroe v. Pape,* supra, the Supreme Court has been engaged in an accommodation of the competing interests involved. While immunity has not been thrown in the trash can, there has been a continuing trend to narrow the doctrine to assure that it is no broader than the discharge of the particular office necessarily requires. In *Schuer v. Rhodes,* supra, the Court held that the governor of a state and other high officials are not immune. In *Wood v. Strickland,* 420 U.S. 308 (1975), the Court held that those who administer school discipline, a discretionary function if not a quasi-judicial function, are not immune if they "knew or reasonably should have known" that they were violating the constitutional rights of the student.

Ever since the adoption of the Civil Rights Acts one hundred years ago, state officials of all types have raised the cry for immunity from damage actions and have flaunted the specter of chaos if they are forced to personally account to the citizenry before the federal courts. Experience, however, has shown that the argument, while far from vacuous, has been overblown.

The Supreme Court has not been unmindful of the need of state officials to conduct their duties freely and fearlessly. To this end, the Supreme Court has fashioned various special defenses, including immunity. However, the Supreme Court, at least in recent years, has also been mindful that the federal courts have a constitutional duty

to enforce the laws enacted by Congress, including the Civil Rights Acts.

While the Supreme Court has been progressively narrowing immunity doctrines, the District Court below has undertaken to broaden "absolute" judicial immunity to include any acts "perceived" necessary to "protect the integrity" of the court. This test is insupportable either in theory or by authority and must be reversed.

CONCLUSION

For the reasons given, a writ of certiorari should issue to review the judgment and decision of the Fifth Circuit.

Respectfully submitted,

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Attorneys for Petitioners

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77———

CHARLES BEN HOWELL, suing on behalf of himself and all other persons similarly situated, as a class ..... *Petitioners*

v.

DALLAS BAR ASSOCIATION, Et al ..... *Respondents*

PETITIONER'S APPENDIX

Proceedings In U.S. District Court

U.S. DISTRICT COURT, N.D.TX., DALLAS DIV.; CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, AS A CLASS V. DALLAS BAR ASSOCIATION, A CORPORATION, SNOWDEN M. LEFTWICH, DEE BROWN WALKER, JERRY L. BUCHMEYER AND ALL PERSONS SERVING AS MEMBERS OF THE DALLAS COUNTY GRIEVANCE COMMITTEE, SIXTH BAR DISTRICT OF TEXAS (FORMERLY KNOWN AS FIFTH DISTRICT) SINCE FEBRUARY 22, 1972; NO. CA3-74-1074-F

COMPLAINT
[Filed November 1, 1974]

JURISDICTION:

1. This is a class action to recover actual exemplary and punitive damages in the amount of one million dollars ($1,000,000.00) and to obtain an injunction forbidding the continuance of the unlawful practices herein shown. This action is brought under the provisions of 42 U.S.C. §§1983, et seq. The District Courts of the United States have jurisdiction over this cause of action under the provisions of 28 U.S.C., §§1331, 1343, 1344, 1355 and 1357.

2. This cause of action arose within the territorial boundaries of the United States District Court for the Northern District of Texas, Dallas Division.

NATURE OF THE CASE:

3. Charles Ben Howell is an attorney conducting a general practice and representing the general public. Defendant, Dallas Bar Association (referred to herein as D.B.A.), organized as a non-profit corporation under Texas laws, has continuously and systematically violated state and federal law by attempting to control the appointment and election of judges in the Dallas County Courthouse. While D.B.A. purports to be an organization of all Dallas lawyers, it is dominated and controlled by establishment type law firms who have an economic interest in assuring that only judges sympathetic to the wealth and power structure of the community are kept in office. The complete and proper name of defendant Dallas County Grievance Committee (referred to herein as D.C.G.C.) is Grievance Committee for the Sixth Bar District of Texas. D.C.G.C. has been authorized by state law to prosecute disbarment

suits against lawyers, and defendant members thereof acted herein under color of state law. D.B.A. and D.C.G.C. are supposed to be separate organizations, but the separation is fictitious. They occupy the same offices, have the same secretarial staff and have interlocking directorates.

4. In each of the general elections since 1968, plaintiff has been nominee of the Republican Party for the office of judge in the Dallas County Courthouse. In each instance, he has attacked the one party judicial monopoly and has been a strong and outspoken advocate of judicial reform. The Dallas County judiciary considers Howell and his campaign for judicial reform, including his campaign for a two term limit for all judges, to be a threat to their jobs. D.B.A. considers Howell and his campaign for judicial reform to be a threat to their ability to see to it that only judges favored by the D.B.A. occupy office in Dallas County.

5. On May 26, 1971, plaintiff went before defendant Dee Brown Walker and assisted his client in securing a divorce. In doing so, he became involved in a dispute with Judge Walker over whether or not Judge Walker is guilty of tampering with and altering official court records as an act of bias and partisanship for the opposing party. Defendants and each of them have conspired and combined with Judge Walker in order to further their own ends, to-wit: the defeat of plaintiff's candidacy for office; and pursuant to such conspiracy and within the scope thereof, have blown the Howell-Walker dispute up and out of all proportion, and have brought an action for disbarment against plaintiff, specifically timed, calculated and motivated to defeat his candidacy for the office of district judge at the general election on November 5, 1974, to plaintiff Howell's damage, as further shown herein.

ORGANIZATION AND OPERATION OF D.B.A.:

6. Dallas County lawyers are roughly divided into two groups. Those who devote most of their time to the representation of banks, insurance companies, large corporations and individuals of substance are generally refered to as "corporate counsel." Most of them are concentrated in large downtown lawfirms. The remaining lawyers, mostly practicing individually and in small firms represent the other 95% of the population. They are usually refered to as "general practitioners."

6a. D.B.A. attempts to project the image of being an organization of all Dallas lawyers but the true facts are that over 1500 Dallas County lawyers, practically all 1500 being general practitioners, do not belong to D.B.A. because they do not wish to contribute to the support of an elaborate luncheon club maintained by D.B.A. in the Adolphus Hotel and because they as general practitioners are not allowed a voice in the affairs of D.B.A. On the other hand, the large firms of corporate counsel require as a matter of policy that all of their licensed personnel belong to D.B.A. and require that all of their licensed personnel vote at D.B.A. elections and in D.B.A.'s judicial polls. Five downtown law firms by themselves can produce 200 votes at a D.B.A. election in which 600 votes or less may be sufficient to win.

7. Through the device of bloc voting, establishment type lawfirms have managed to maintain control over D.B.A. for many years. The majority of the Board of Directors of D.B.A. is now and has been, corporate counsel. The majority of the officers of D.B.A. is now and has been corporate counsel. In order to preserve an illusion of balance, D.B.A. has from time to time selected as officers or directors a few "tame" general practitioners whom the

power structure felt would not rock the boat. However, at all times, control of D.B.A. has been vested in establishment type lawyers and law firms.

ORGANIZATION AND OPERATION OF D.C.G.C.:

8. Texas state law provides that D.C.G.C. and other grievance committees shall operate as state agencies and D.C.G.C. therefore has a constitutional immunity from lawsuits such as this. However, the members of D.C.G.C. are not above the law and all of those holding office in D.C.G.C. since February 22, 1972 are hereby sued to account for their individual actions. Members of D.C.G.C. are appointed by the president of the State Bar of Texas. However, D.B.A. has been successful over the years in persuading the president of the State Bar, usually residing in another part of the state and having no particular interest in Dallas County, into appointing only D.B.A. nominees to D.C.G.C. Every member of D.C.G.C. is presently a member of D.B.A. and no non-D.B.A. member has been a member of D.C.G.C. for many years, if ever.

8a. As an illustration of the unholy alliance between D.B.A. and D.C.G.C., plaintiff would show that defendant Judge Walker is a former chairman of D.C.G.C.; that defendant Weber, now president of D.B.A. was the D.C.G.C. member originally selected by D.C.G.C. to assist defendant Judge Walker in the preparation and prosecution of grievance charges against plaintiff Howell; that defendant Burleson, chairman of D.C.G.C. when Judge Walker first filed charges against plaintiff Howell with D.C.G.C., is presently vice-president of D.B.A.; and that defendant Buchmeyer, presently chairman of D.C.G.C. is a vice-president of D.B.A. D.B.A. works closely with D.C.G.C. Most complaints against lawyers are received and pro-

cessed at D.B.A. headquarters. D.B.A. assists financially in the operation of D.C.G.C. D.B.A. controls and dominates D.C.G.C. It has no independent existence and is the mere alter ego of D.B.A.

POLITICAL ACTIVITY OF D.B.A.:

9. There are approximately 40 judges in the Dallas County Courthouse. All but three or four of them started their judicial careers with a partisan political appointment. Each four years thereafter, they have come up for re-election. However, few lawyers have had the courage to face an incumbent judge at the polls because an incumbent judge has too many subtle opportunities to hurt a lawyer in his practice, and further, because they recognized the futility of bucking the political muscle of D.B.A. Most incumbent judges are reelected without opposition. Approximately 20 judges are on the November 5, 1974 election ballot with no opposition versus about four who have opposition. Defendants Leftwich and Walker both started their judicial careers with partisan political appointments and prior to this election, Defendant Leftwich has never had an opponent at the polls, and Defendant Walker has been opposed only once. Prior to their appointment as judges, Leftwich and Walker were active members of D.B.A. and secured their appointments to office through the influence of D.B.A.

10. Over the years, D.B.A. has managed to control the membership of the Dallas County judiciary by controlling judicial appointments. Within the past thirty days, D.B.A. has managed to secure the appointment of John Louis Shook as Judge of the 191st District Court. Shook is a former president of D.B.A.

11. Beginning around 1960, the rise of two party politics in Dallas County, Texas has caused D.B.A. to become concerned over its continued ability to control the membership of the Dallas County judiciary. Republican candidates began offering themselves for office against the D.B.A. sponsored candidates. In 1962, John R. Bryant won election as a judge, the first judicial candidate of any party to win judicial office in Dallas County against a D.B.A. sponsored candidate.

12. In order to counter the effect of two-party politics, D.B.A. passed a bylaw forbidding its members from giving public endorsements to individual candidates for judicial office. In lieu thereof, the D.B.A. bylaws provided that a judicial preference poll should be conducted and the results thereof be publicized as the choice of Dallas County lawyers.

13. The D.B.A. preference poll represents not the choice of Dallas County lawyers, but the choice of the small group of men who control the bloc voting power of the establishment type lawfirms. As an illustration of the ability to control the vote on the judicial preference poll, plaintiff would show that incumbent judges who got into office in the first place with the blessing of the D.B.A. have always won the judicial preference poll by large majorities. In fact, the only incumbent judge ever to lose the poll was the aforesaid Republican judge, the Hon. John R. Bryant, in the year 1966. Even though D.B.A. has attempted to pass the winners of the poll off on the public as the choice of Dallas County lawyers, D.B.A. has consistently refused to provide ballots to those 1500 non-D.B.A. members, practically all of whom are general practitioners and who are the true legal representatives of the general public.

14. The judicial preference poll is a violation of state and federal law because D.B.A. has consistently refused to register as a partisan political organization. D.B.A. is in violation of the laws prohibiting political activity by corporations. D.B.A. is in violation of the laws prohibiting corporate contributions to political activities. D.B.A. holds a permit from the U.S. Postal Service to mail as a non-profit organization at less than half rates and they have used this permit to promote their poll. D.B.A. is registered with the Internal Revenue Service as a non-profit, non-political organization and has secured an exemption from federal income taxes both for itself and those contributing money to it on the grounds that it is a non-profit, non-political organization. Such funds, when received, have been used to promote and operate this poll thereby causing tax deducted funds to be channelled into political activity. Among other things, D.B.A. has employed tax deducted funds for the insertion of so-called "public service" announcements in the newspapers promoting the D.B.A. candidates for election.

15. Over the past few years, judicial candidates running in opposition to D.B.A. candidates have been gaining strength and numbers. Late in 1973, in order to counter this trend, D.B.A. devised another poll called the judicial evaluation poll. The deadline to file for office as Judge was February 4, 1974. The results of this poll were published about six weeks beforehand. In the judicial evaluation poll, only the names of the incumbent judges were listed and the lawyers were asked to answer questions about the performance of each judge. Again, no ballots were distributed to the 1500 general practitioners representing the general public. The poll was made unbelieveably complicated in an effort to discourage those busy general practitioners, who

do pay the price of D.B.A. membership, from voting therein and thereby enhancing the bloc voting power of the establishment.

16. D.B.A. confidently anticipated that the judicial evaluation poll would be a "love feast." D.B.A. anticipated that D.B.A. sponsored incumbents would receive fantastically high ratings on the judicial evaluation poll, that the same would be published and circulated immediately prior to the deadline to file for election and that independent candidates, both Democrats and Republicans, would be discouraged from running against D.B.A. sponsored incumbents. The poll worked out as anticipated with respect to the large majority of incumbents. However, certain of the D.B.A. incumbents were held in such low esteem, even by the membership of D.B.A., that they received extremely poor marks on the judicial evaluation poll.

17. In particular, 62% of D.B.A. members voting this poll responded that the defendant Leftwich does not have an adequate knowledge of the law. The same lawyers also voted by very lopsided margins that defendant Leftwich has poor judicial temperament and that he even lacks in common courtesy. These were by far the lowest marks received by any civil district judge.

18. With respect to the defendant Judge Walker, 29% of the lawyers voted that he does not know and apply the rules of procedure, 39% of the lawyers voted that he does not have an adequate knowledge of the law, 34% voted that he does not consider authorities submitted by counsel and 11% even voted that he is not a man of good character and integrity.

19. Obviously, the D.B.A. judicial evaluation poll had backfired. Based upon the results of this poll, and his own

knowledge of the situation, plaintiff Howell on February 4, 1974 filed for office as Judge of the 192nd District Court. He proceeded to make the judicial evaluation poll into his major campaign issue. Word leaked out that plaintiff Howell was planning a major media advertising program based upon the judicial evaluation poll. Defendant Leftwich appealed to D.B.A. for assistance in saving his seat in the Dallas County Courthouse. D.B.A. decided that the only way to salvage the situation was to institute proceedings against plaintiff Howell through D.C.G.C.

19a. D.C.G.C. had previously given assurances to plaintiff Howell that they would not interfere with his political campaign and would not utilize his dispute with Judge Walker as a political issue. However, D.C.G.C. reneged on its commitments and promises in the premises. A suit was filed against plaintiff Howell for disbarment seven (7) days before the election in the name of D.C.G.C. The suit was purposely filed two days before the opening of plaintiff Howell's advertising campaign. The suit was purposely timed and calculated, and the allegations therein were made particularly tailormade, to generate adverse publicity against plaintiff Howell and to defeat his candidacy for office by suing him in the name of the State of Texas by and through D.C.G.C. and widely publicizing the suit. Such conduct constituted a conspiracy by all defendants acting under color of State law in violation of the civil rights laws and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

PLAINTIFF'S DISPUTE WITH JUDGE WALKER:

20. Plaintiff Howell's dispute with the Honorable Dee Brown Walker was not the cause of the disbarment pro-

ceedings against plaintiff Charles Ben Howell. It was merely a convenient vehicle seized upon by defendants in furtherance of their conspiracy to defeat plaintiff's candidacy for office. At the time the disbarment suit was filed, seven days prior to the election, the alleged misconduct was 3½ years old. Plaintiff brought his divorce client before defendant Judge Walker on May 26, 1971 and secured for her a default judgment. While the husband and wife had been both personally in front of Judge Gibbs with respect to temporary matters, the husband and his lawyer had failed to file a formal written answer to the divorce suit, which under the law, entitled the wife to a default judgment. Plaintiff Howell explained to Judge Walker that the parties had been in court with respect to temporary matters and handed to Judge Walker the docket sheet upon which Judge Gibbs had made extensive notations concerning his temporary order. Judge Walker inquired if the husband had a lawyer and the name of the lawyer. Plaintiff and his client furnished the information to Judge Walker and advised Judge Walker that he did not know why a formal written answer had not been filed in the case. Judge Walker proceeded to enter his default judgment on the docket sheet one line below the order entered by Judge Gibbs. Judge Walker was in a hurry and made only superficial inquiries because he was of the opinion that the husband, within the 30 day period allowed by law, would file a motion to set aside the default and that he, Judge Walker, could set the entire matter aside.

21. However, the husband and his attorney failed to file a motion to set the judgment aside within 30 days and the judgment became final. The husband's attorney was an establishment type D.B.A. firm. They complained to Judge Walker and a hearing was held in Judge Walker's court on

July 23, 1971. On that date and on numerous occasions thereafter Judge Walker urged plaintiff Howell to execute an agreement setting the default judgment aside because the opposing attorney "might get sued for malpractice." Plaintiff Howell replied that the Judge was asking plaintiff Howell to be disloyal to his client. If the judgment was defective, plaintiff Howell argued, Judge Walker had ample power under the law to set it aside without consent of plaintiff Howell or his client. On the other hand, if the default judgment was good, plaintiff Howell stated that he had advised his client that she should stand on it.

22. On December 13, 1971, Judge Walker entered an order setting aside the default judgment. Subsequently, plaintiff Howell inspected the court papers for the purpose of taking an appeal and discovered that the papers had been tampered with. On January 31, 1972, plaintiff presented a witness in open court who testified that Judge Walker had ordered him to doctor up the papers in the case and to falsely backdate his certificate.

23. Defendant Judge Walker became irate with plaintiff Howell and undertook to do all that he could to use the power of his office to even the score with plaintiff Howell. On or about February 22, 1972, defendant Walker certified a complaint regarding plaintiff Howell's conduct to D.C.G.C. Since then, he has numerously urged them to take action against plaintiff Howell. D.C.G.C. could find nothing unlawful in plaintiff's conduct. Plaintiff at all times was attempting to represent his client and secure for her her lawful rights to her. The constitutional right to petition for a redress of grievances in a court of law, guaranteed by the First Amendment to the United States Constitution, is an empty and worthless right, unless a party can secure a lawyer to represent him. Unless the conduct

is clearly criminal and there is a clear and unmistakable intent to violate the law, lawyers may neither be sent to jail nor fined nor deprived of their livelihood for the manner in which they seek to represent their clients. Under such circumstances, plaintiff Howell's conduct was privileged by the right of petition contained in the First Amendment to the United States Constitution.

24. D.C.G.C. was reluctant to act on the complaint because it could find no valid grounds to act. However the members of D.C.G.C. are all practicing lawyers and they and their partners have occasion to go in front of Judge Walker from time to time. Therefore, they were reluctant to dismiss the charges. Finally, after much prodding from Judge Walker, they held a hearing on the charges on September 7, 1972. At the D.C.G.C. hearing, Judge Walker admitted that he had tampered with the record and admited that he had done so as an act of partiality and favoritism to the opposing side of the lawsuit. He refused to produce the letter which he had written to Judge Holland in an effort to prejudice the trial of the contempt action which he had brought against plaintiff Howell and misrepresented the contents of that letter. He further admitted a personal bias against plaintiff Howell for a number of years past. Even though plaintiff demonstrated at such hearing that the complaint was a mere spite action against him, D.C.G.C. refused to dismiss the proceedings because on the one hand they were reluctant to incur the displeasure of Judge Walker and on the other hand they possessed of a substantial dislike for plaintiff because of his political campaigns against D.B.A.-D.C.G.C. sponsored candidates and his public statements questioning the fairness of the judicial preference poll of the D.B.A.

25. Not being satisfied to merely file disbarment proceedings, defendant Walker proceeded on March 3, 1972 to institute contempt of court proceedings against plaintiff Howell. He assured plaintiff Howell that plaintiff Howell would have a full and fair hearing before another judge. He proceeded to secure the appointment of Judge Louis Holland of Montague, Texas, a long-time political office holder and another member of the Texas one party judicial system which plaintiff has consistently spoken against.

26. Disregarding his previous assurances to plaintiff Howell, Judge Walker clandestinely contacted Judge Holland, had a private conference with him and wrote to Judge Holland at least one letter calculated to influence his judicial action. The same was a clear violation of the Texas Canons of Judicial Ethics then in force stating "A Judge should not permit private interviews, arguments or communications designed to influence his judicial actions," and that all such communications "should be made known to opposing counsel." Plaintiff only found out about the matter by accident.

27. Judge Holland came to DALLAS and held a contempt hearing on July 27, 1972. He refused to allow plaintiff Howell to produce evidence that Judge Walker was prosecuting a spite suit. He upheld the charge of contempt brought by Judge Walker. He further convicted plaintiff Howell of contempt for refusing to disclose to him, Judge Holland, the names of the attorneys whom plaintiff Howell had consulted with respect to the defense of Judge Walker's contempt proceedings; plaintiff Howell advising Judge Holland that he did not wish to expose such lawyers to the possibility of recrimination by Judge Walker. Such conviction was a violation of plaintiff's rights under

the First Amendment to the United States Constitution of Freedom of Association, Right to Privacy and Right to Counsel.

28. Plaintiff Howell filed a petition for relief with the Texas Court of Criminal Appeals at Austin, Texas, being another component of the Texas one-party judicial monopoly. Plaintiff alleges on information and belief that Judge Walker again attempted to influence the Court of Criminal Appeals through clandestine communications. When the Court of Criminal Appeals upheld the convictions, plaintiff filed a motion for a poll of the Court as to its communications with Judge Walker, but the Court refused to respond thereto.

29. *Article* 44.24 of the Texas Code of Criminal Procedure provides that in each case, "the Court of Criminal Appeals shall deliver a written opinion setting forth in intelligible language the reason for such decision." In spite of the plain provisions of the law, the Court of Criminal Appeals failed and refused to rule upon the following propositions urged by plaintiff Howell: (1) That the refusal to allow cross-examination of Judge Walker as to bias and prejudice violated the constitutional right to the confrontation and cross-examination of one's accusers; (2) That Judge Holland became disqualified to conduct the trial through his failure to disclose private communications received by him from Judge Walker; (3) That "the contempt power must not be exercised in a manner that inhibits zealous advocacy."

30. Plaintiff thereafter applied to the United States District Court for the Northern District of Texas for relief from the contempt charges. The Court declined to issue a writ of habeas corpus, but did issue a stay order against

the Dallas County Sheriff, and did allow the filing of a personal recognizance bond so that plaintiff Howell was not placed in jail as ordered by the Texas Court of Criminal Appeals on January 12, 1973. The Court further issued a certificate of probable cause allowing plaintiff to prosecute an appeal to the United States Court of Appeals for the Fifth Circuit where proceedings are now pending.

POLITICAL ACTIVITY OF D.C.G.C.:

31. D.C.G.C. is supposedly an official state agency of the State of Texas. As such, it is precluded from engaging in any type of political activity. However, D.B.A. has repeatedly used and employed the prosecutorial powers of D.C.G.C. and threats thereof for political purposes.

32. The membership of D.C.G.C. and other lawyers who are D.B.A. members and are designated as associate members of D.C.G.C., have from time to time informally communicated to Dallas County lawyers, even those who are disfranchised and may not vote in D.B.A. polls, the message that any public endorsement of a candidate for judicial office would be construed by D.C.G.C. as a violation of the anti-advertising provisions of the Texas Canons of Ethics and Code of Professional Responsibility.

33. In spite of this stand by D.B.A. and D.C.G.C., various lawyers have from time to time openly endorsed various candidates for judicial office. However, whenever the candidate endorsed is the favorite of D.B.A., both D.B.A. and D.C.G.C. have looked the other way and have consistently ignored the infraction.

34. During January of 1970, Chester Oehler, a Dallas attorney, announced that he would be a candidate in the Democratic primary for the office of probate judge. He

opposed Oswin Chrisman, a D.B.A. backed appointee. Immediately thereafter, if not even previous thereto, D.C.G.C. was possessed of complaints from dissatisfied clients that Oehler had charged excessive fees. However, D.C.G.C. sat on its hands and did nothing until April 22, 1970, just ten days before the Democratic primary when D.C.G.C. filed suit for disbarment against Oehler, the same type of obvious political power play employed against plaintiff Howell. The suit was filed purposely at such a late date that Oehler had no chance to reply to the charges against him and he was defeated in his candidacy for office. Subsequently, being financially and emotionally exhausted and being fearful of the further consequences of fighting the D.B.A.-D.C.G.C. power structure, Oehler settled the case for a minor plea rather than contest the charges and risk a permanent disbarment. Either by accident or design, the Oehler disbarment suit was prosecuted in the courtroom of the Honorable Dee Brown Walker, former chairman of D.C.G.C.

35. Plaintiff Howell filed for office as Judge of the 192nd District Court on February 4, 1974. D.C.G.C. was then and there possessed of all information of which it was possessed on October 29, 1974, nine months later, and there has been no change in the status of the contempt proceedings. If D.C.G.C. was convinced as of that time that the charges against plaintiff Howell were valid and that plaintiff Howell was in fact guilty of professional misconduct, D.C.G.C. had a duty to act immediately and to reject all importunities for delay. However, D.C.G.C. proceeded to handle the case exactly the same as it had handled the prior Oehler case. D.C.G.C. sat on its hands until Tuesday, October 29, 1974, seven days before the date of the general election when it proceeded to institute a disbarment suit

against plaintiff Howell in the 101st District Court of Dallas County, Texas.

36. Such suit was obviously planned and timed for maximum political impact and was calculated to come too late in the day for plaintiff Howell to reply or to have his day in court prior to the election.

JURY DEMAND:

37. Plaintiff demands trial by jury of all issues which, under the law, are subject to trial by jury.

PRAYER FOR RELIEF:

WHEREFORE, PLAINTIFFS DEMAND JUDGMENT AS FOLLOWS:

A. For actual damages sustained plus exemplary and punitive damages sufficient to teach the defendants a lesson and prevent further misconduct in the total amount of one million dollars, exemplary damages to be assessed against the individual defendants in proportion to their wrong doing.

B. For declaratory judgment that the D.B.A. is and has been engaged in political activity contrary to law.

C. For declaratory judgment that the D.C.G.C. is and has been engaged in political activity contrary to law.

D. For injunction against future violations by D.B.A.

E. For injunction against future violation by the individual defendants including defendant members of D.C.G.C.

F. For the costs of this action.

G. For all other and further relief in such cases provided. [J.A.4-19]

[DISTRICT JUDGE'S] MEMORANDUM [OPINION]
[Caption same as P.A.1; filed April 2, 1975]

On this day came to be considered by the court the Motions to Dismiss filed by defendants Jerry Buchmeyer, Snowden Leftwich, Dee Brown Walker, and the Dallas Bar in the above numbered and styled cause. The court has reviewed the briefs on the Rule 12 motions, and plaintiff Charles Ben Howell's complaint, and is convinced that the entire action must be dismissed for any one of several reasons, as set out below.

Assuming, but not deciding, that any or all of the parties could be properly named in the lawsuit, the court feels that it could not be maintained. Plaintiff fails to show a conspiracy relating to his alleged constitutional deprivations with any specificity as is necessary in a civil rights complaint. *Ellingburg v. King,* 490 F. 2d 1270 (8th Cir. 1974); *Burak v. Commonwealth of Pennsylvania,* 339 F. Supp. 534 (E.D. Penn. 1972). Plaintiff further fails to show deprivation of federal constitutional rights, as opposed to any state rights which may be involved, since Plaintiff asserts a cause of action in relation to the privilege of holding state office. *Snowden v. Hughes,* 321 U.S. 1 (1943); *Peterson v. Knudson,* 367 F. Supp. 515 (D. Minn. 1973). It is of course essential that federal deprivations be shown in order to state a cause of action under the civil rights statutes, which are the basis of Howell's complaint.

However, despite these shortcomings, the court does not feel that it is necessary to even reach the merits of this case. Plaintiff attempts to name two state district judges, the individual members of the local state bar grievance committee, and the Dallas Bar Association as defendants in this civil rights action brought under 42

U.S.C.A. 1983, et seq. However, it must be remembered that these statutes did not displace the traditional immunities for judicial bodies and judges. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Clark v. Washington*, 366 F. 2d 678 (9th Cir. 1966). Under the holding of *McAlester v. Brown*, 469 F. 2d 1280 (5th Cir. 1972), it is clear that even though a judge acts maliciously, so long as the action is taken under the sheltered zone of judicial jurisdiction, the judge can suffer no liability for the acts taken. The acts complained of fall within this sheltered area in so far as the two state district judges are concerned. They were acts perceived to be necessarily taken by the judges in order to protect the integrity of the state courts, and a federal court will not look behind the actions taken pursuant to proper powers.

The next defendants are the members of the Dallas County Grievance Committee. The Committee consists of members of the State Bar appointed by the State Bar Committee on the recommendation of the Director of the local district. State Bar Rules, Title 14 Appendix, Art. 12, V.A.T.S. (1973). The State Bar itself is an administrative agency of the Judicial Department of the state. Art. 320a-1, V.A.T.S. (1973). Obviously, there is an issue as to the possible immunity from suit for the individual members of the Committee on the facts presented by this case.

While the Court of Appeals for the Fifth Circuit has never considered this type of immunity from suit, several cases can be used for purposes of surmising what the proper holding would be. In *Lewis v. Brautigam*, 227 F. 2d 124 (5th Cir. 1955) the circuit recognized the view that a prosecuting attorney, as a quasi-judicial officer, has immunity from suit for acts carried out under the authority of his employment, and suits based on the civil rights statutes have been dismissed when brought against state

prosecutors on the basis of actions taken in their prosecutorial capacity. *Madison v. Gerstein*, 440 F. 2d 338 (5th Cir. 1971).

Other circuits have extended this immunity to members of bodies charged with the bringing of a disbarment proceedings. *Ginger v. Circuit Court*, 372 F. 2d 621 (6th Cir. 1967). The court in *Clark v. Washington*, 366 F. 2d 678 (9th Cir. 1966), agreed, stating that a Bar Grievance Committee, as an arm of the State Court, cannot have civil rights suits brought against it. Although the form of the Texas grievance committees differ somewhat from those presented in the *Ginger* and *Clark* cases, this court feels that for sound policy reasons this immunity from liability for actions taken under guise of proper jurisdictional authority should extend to members of local Texas grievance committees. Even though, as expressed by Judge Goldberg in *McAlester v. Brown, supra*, there exists the possibility of abuse when immunity is allowed, such immunity is necessary in order to insure vigorous good faith enforcement and administration of law.

The other named defendant, the Dallas Bar Association, is a private organization. As such, it cannot act under color of state law for purposes of 42 U.S.C.A. 1983. And even though a private person may be sued under 42 U.S.C.A. 1985, *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the court sees that Plaintiff's complaint is not based on racial or otherwise class based invidiously discriminatory animus. Some courts have allowed 1985 actions to be brought by any person who alleges to be the object of invidious discrimination, *Phillips v. Trello*, 502 F. 2d 1000 (3rd Cir. 1974); *Azar v. Conley*, 456 F. 2d 1382 (6th Cir. 1972). However, other courts have limited 1985 actions to class based discrimination which is akin to racial discrimination,

Arnold v. Tiffany, 359 F. Supp. 1934 (C.D. Cal. 1973), aff'd on other grounds, 487 F. 2d 216 and this court feels that such a limitation is more in line with the reasoning of the *Griffin* case. The Court there indicated that it did not wish 1985 to become a general tort law, and the limitation set out in *Arnold,* along racial or alienage class lines, seems necessary to keep 1985 the type of action which its origins indicate it should be.

In light of the above discussion, the court is of the opinion that this case should be dismissed in its entirety. [J.A.35-38]

ORDER OVERRULING MOTION FOR AMENDMENT OF COURT'S FINDINGS

[Caption same as P.A.1; filed June 30, 1975]

On this day came to be considered before the Court plaintiff's Motion for Amendment of Court's Findings filed in the above numbered and styled cause. After a review of the pleadings and briefs the Court is of the Opinion that its previous Order of Dismissal, filed on April 2, 1975, should be allowed to stand.

The Court will not allow the plaintiff to take a non-suit or move for a voluntary dismissal in this case because it had been dismissed when the motions to do so were made. Further, the logic which dictates that certain officials be immune from suit for actions taken in their official capacities flows not only to suits for damages, but to any injunctive relief which is sought as well. And when a Court finds that the named defendants are immune from suit in a particular case, there is no need to continue to the merits nor make any findings. The Court therefore DENIED plaintiff's Motion for Amendment of Court Findings, Motion for New Trial, and Motion for Rehearing. [J.A.48]

Proceedings In The Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 75-3326

CHARLES BEN HOWELL, suing on behalf of himself and all other persons similarly situated, as a class,

Plaintiffs-Appellants,

versus

DALLAS BAR ASSOCIATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the

Northern District of Texas

(April 21, 1977)

BEFORE AINSWORTH and MORGAN, Circuit Judges, and LYNNE*, District Judge

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

Costs are to be taxed against plaintiffs-appellants.

*Senior District Judge of the Northern District of Alabama, sitting by designation.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Issued as Mandate:

CLERK'S NOTICE

[Caption as immediately foregoing;
dated June 14, 1977]

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

DALLAS TIMES HERALD, Thursday, July 15, 1976 ....C—5

Jury may get disbarment case today

By PAUL WEST
Staff Writer

The disbarment trial of Republican judicial candidate Charles Ben Howell was expected to go to the jury today following final arguments by both sides in 101st District Court here.

In testimony Wednesday, Howell was labelled "a sick man" by District Judge Dee Brown Walker, his opponent in the November general election race for the 162nd District Court bench.

Howell, 51, of Dallas, is accused of professional misconduct by the State Bar of Texas in connection with a 1971 case in which he allegedly failed to disclose all facts of a divorce action to Walker when he asked him to award custody of children to his client.

The state bar rested its case Wednesday afternoon following an appearance by Walker, who filed the original disbarment complaint against Howell in 1972.

Walker disputed Howell's testimony that he informed the judge of another pending case involving his client when he sought a ruling from Walker in May 1971.

Charles Ben Howell . . .
. . . nears end of trial

"He did not," Walker said bluntly, when questioned about Howell's actions by state bar attorney Stan McMurry of Dallas.

Howell testified Tuesday he informed Walker of the existence of the other suit but didn't provide details "because Judge Walker didn't ask."

But Walker contended Howell had a

duty as a lawyer to provide the information without being asked.

"Part of the judicial system is the responsibility on the lawyer to be candid and open to a judge," Walker testified. "And they have just as much responsibility to see that justice is done as I do."

Walker said he considered Howell "a sick man" and that "many members of the bar and bench" agreed with him.

"Practically all of them (Dallas lawyers and judges) think something's wrong with him," testified Walker.

"Mentally wrong?" asked McMurry.

"Yes, sir," replied the judge.

Walker named Dallas attorneys William Pritchard and Larry Anderson and Dist. Judges Ted Robertson, Hugh Snodgrass and Fred Harless among those who agreed with his assessment of Howell.

"I don't think he ought to have a (law) license," concluded Walker.

Walker, who has served 13 years on the county district bench, acknowleged under cross examination that if Howell is disbarred it will disqualify him from the November election race.

Howell, a four-time loser in county judgeship contests, faces reprimand, suspension or revocation of his legal license if the jury rules against him.

In testimony Wednesday Howell flatly denied violating professional ethics in his handling of the divorce case.

Asked by defense attorney Waggoner Carr, former Texas attorney general, if he had behaved fraudulently or broken the professional ethics code in handling the divorce action, Howell replied, "No, sir."

The defense said it hoped to call several character witnesses on Howell's behalf when the trial resumed at 9 a.m. this morning, but a series of rulings by presiding Judge Frank Wear of Paris cast doubt they would be allowed to testifiy.

Wear said he did not think character witnesses were allawed to testify in civil cases and asked lawyers for both sides to present arguments on the question when court convenes this morning.

The jury will decide the case but Wear must set the penalty, if the jury rules against Howell.